ELECTION OF REMEDIES, A CRITICISM.

WE have been told that underlying every rule of the common law is a principle. To interpret and apply the rule properly to a given state of facts it is necessary to understand the principle upon which the rule is founded. It is seldom that there is any conflict among the courts as to the principle upon which any particular rule of law is based; the usual conflict in decisions arises not from a conscious difference of opinion as to underlying principles, but from a neglect to examine into the principle and use it as an aid in applying the rule. When, however, we find courts taking pains to inquire into the principle underlying a given rule and arriving at different conclusions as to the principle upon which the rule is founded, a conflict of decisions in the application of the rule is inevitable. Differences of opinion as to the reason for a rule of law suggest an inquiry as to whether such rule has any sound basis in principle, and when such an inquiry discloses that the alleged principle upon which the rule is most generally conceded to rest is in conflict with other established rules or principles of the common law, and that the operation of the rule is harsh, and frequently results in injustice, it is justifiable to question the validity of the rule itself.

It is submitted that the common rule of law as to election of remedies is thus open to challenge. Characteristic statements of the rule are as follows:

"An election once made with knowledge of the facts between coexisting remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit or proceeding based upon any remedial right inconsistent with that asserted by the election." [1]

"The commencement of an action upon one theory constitutes an election." [2]

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[1] Stewart *v.* Salisbury Realty & Ins. Co., 74 S. E. 736 (N. C., 1912).

[2] McLaughlin *v.* Austin, 104 Mich. 489, 491, 62 N. W. 719 (1895); Frisch *v.* Wells, 200 Mass. 430, 431, 86 N. E. 776, 777 (1909); Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272 (1890).

Before examining the accuracy of this broad assertion, it should be pointed out that a great majority of the cases disposed of by the application of this rule would have been disposed of in exactly the same way by the application of other established rules of the common law, particularly those relating to estoppel, waiver, and ratification.[3] It is the comparatively small class of cases, the decision of which depends solely upon the strict application of the rule of election, that gives rise to this criticism. Let us now see if the indictment can be made good.

First. Courts differ as to the principles upon which the rule of election of remedies depends.

Some courts apparently consider that the rule depends upon the same principles as the doctrine of estoppel, that "the word 'election' as applied to remedies is but another term for estoppel."[4] No complaint can be made of the application of the rule by courts taking this view. On the other hand, such interpretation of the rule robs it of vitality and deprives it of all excuse for existence as a separate and distinct doctrine of the law. Decisions in such jurisdictions are governed by the principles of estoppel, and the same result would be reached without reference to any special rule as to election of remedies.

A large number of decisions, however, apply the rule to cases in which there is no element of estoppel *in pais*. The principle of the rule, so far as it can be gathered from these decisions, is that public policy demands that a suitor shall not experiment with the remedies which the law affords, that to permit a suitor to commence an action on one theory and later to dismiss that action and commence a new one on a different theory imposes a useless and unnecessary burden on the courts.[5]

The term "election" is often applied to the well-established

[3] For example, the leading federal case on election of remedies, Robb *v.* Vos, 155 U. S. 13 (1894) could have been decided by applying ordinary rules of estoppel and ratification.

[4] First National Bank *v.* Commission Co., 198 Ill. 232, 64 N. E. 1097 (1902); Johnson-Brinkman Commission Co. *v.* M. P. Ry., 126 Mo. 344, 28 S. W. 870 (1894); Bolton Mines Co. *v.* Stokes, 82 Md. 50, 33 Atl. 491 (1895). See Bigelow on Estoppel, 3 ed., 562; 19 Yale L. J. 239.

[5] Stewart *v.* Salisbury Realty & Ins. Co., 74 S. E. 736 (N. C., 1912); O'Bryan *v.* Glenn, 91 Tenn. 106, 17 S. W. 1030 (1892); Thompson *v.* Howard, 31 Mich. 309 (1875); Connihan *v.* Thompson, 111 Mass. 270 (1873); Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272 (1890). See 6 Cyc. 297.

doctrine that one cannot claim under a will or deed and also in opposition to it. This doctrine is distinct from the doctrine of election between remedial rights. In a case of the former class the Supreme Court of the United States uses the following language:

"The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where inconsistent or alternative rights or claims are presented to the choice of a party by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so in other words that one cannot take a benefit under an instrument and then repudiate it." [6]

If the doctrine of election of remedies is an outgrowth of this doctrine of election, it is evident that the basic principle referred to has been forgotten. The rule is constantly applied in favor of defendants who have been guilty of inequitable conduct against plaintiffs who have been guilty of none.

Second. The operation of the rule is harsh.

If the rule as to the binding effect of an election were only applied in cases where there was in fact a trifling with justice — a dismissal of one action and the commencement of a new one without any reason or excuse therefor — the rule would be less open to criticism. But it recognizes no such exceptions. Its operation may be illustrated by a concrete case. One who has been induced by fraudulent misrepresentation to invest most of his capital in the purchase of mining stocks, on learning of the fraud tenders back the stock and commences an action at law for money had and received or in equity for rescission of the contract of sale and the recovery of the purchase money. He acts with full knowledge of the existing facts, and chooses the remedy which will most effectually remedy the wrong by restoring to him all that he parted with. The defendant denies the fraud or alleges that the plaintiff in fact learned the facts long ago and has been guilty of laches in seeking rescission. Issues of fact are raised which make certain a long and costly litigation. Thereafter the plaintiff, having most of his funds invested in the property which he was induced to purchase by the defendant's fraud, loses the balance of his property and becomes destitute. He therefore sells the mining stock for the best price obtainable

[6] Peters *v.* Bain, 133 U. S. 670, 695, 10 Sup. Ct. 354 (1890).

and begins an action of deceit against the defendant to recover damages for the fraud. The defendant pleads that the plaintiff had two inconsistent remedies, one to rescind the contract, the other to affirm the contract and sue for damages for the fraud; that his tender of the property and commencement of suit for rescission for money had and received operated as a binding operation to rescind. Under the rule as generally stated and frequently enforced, the plea must be sustained.[7] On the facts stated it is the commencement of the action, not the sale of the stock by the defrauded party, that bars the subsequent action for damages.[8]

The rule always operates in favor of the party who has committed a wrong and against the party originally entitled to redress. As applied by some courts one of several joint tortfeasors may plead in bar to an action for damages for conversion, a prior suit on implied contract against another of the joint tortfeasors. Such a result is a plain sacrifice of justice for the sake of theoretical consistency.[9] By the application of the doctrine of election an exactly opposite effect is thus given to the commencement of actions theoretically different but practically almost identical in purpose and result. So far as any actual intent on the part of the plaintiff to pass title to the wrongdoer is concerned an action of trover for the recovery of the value of property as damages for conversion is similar to an action of implied contract for the value of the property. Both actions assume that the tangible property itself has gone from the plaintiff forever. The action of trover is based on a disaffirmance of a contract, but its object is the recovery not of the property but of its entire value. Title does not pass to the wrongdoer as a result of such an action until judgment according to the early English decisions,[10] and until judgment and satisfaction according to modern authorities.[11] On the other hand the mere commencement of an action of implied contract for the

[7] Stewart *v.* Salisbury Realty & Ins. Co., 74 S. E. 736 (N. C., 1912); Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272 (1890); Droege *v.* Ahrens Mfg. Co., 163 N. Y. 466, 57 N. E. 747 (1900).

[8] Clark *v.* Morgan County Nat. Bank, 196 Fed. 709 (1912).

[9] Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272 (1890). *Cf.* Hitchin *v.* Campbell, 2 W. Bl. 827 (1771); Fireman's Ins. Co. *v.* Cochran, 27 Ala. 228, 236 (1855); Marsh *v.* Pier, 4 Rawle (Pa.) 273, 285 (1833).

[10] Buckland *v.* Johnson, 15 C. B. 145 (1854).

[11] 28 Am. & Eng. Encyc. of Law, 738.

value of property wrongfully converted by the defendant, although equally in disaffirmance of any actual express contract between the parties, is held by Mr. Justice Peckham to pass title at once to the defendant so as to bar subsequent suits for damages against joint tortfeasors not parties to the first action.[12]

Third. The alleged principle upon which the rule, as generally stated and applied, must rest is not consistent with other rules of law.

If public policy, to prevent trifling with justice, forbids a suitor who has two remedies to dismiss a suit for one and resort to the other, notwithstanding the fact that no action has been taken by other persons in reliance on the suit first commenced, the same public policy should require a suitor who has one remedy, and who commences an action therefor, to prosecute that action to a conclusion or be forever barred; yet the law permits one to dismiss an action without prejudice and recommence a similar action.

Furthermore, the rule as to election of remedies does not apply unless the plaintiff actually has two inconsistent remedies;[13] but if we assume the principle underlying the rule to be that the time of the courts shall not be taken up with different suits against the same defendant based on the same state of facts, the plaintiff should be required in all cases to elect at his peril between inconsistent theories. It cannot be denied that a defendant suffers more by being compelled to defend successive suits prosecuted to final judgment by a plaintiff who in fact had but one available remedy, than he does by being sued twice by a plaintiff who had two available remedies but who abandoned one suit immediately after its commencement. More time of the courts, also, is wasted by the first suitor than by the second.

Fourth. Decisions applying the rule are in conflict in many respects.

Many cases hold that the mere commencement of an action with full knowledge of the facts operates as a final election;[14] others, as pointed out above, refuse to consider the mere commence-

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[12] Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272 (1890); Smith *v.* Baker, L. R. 8 C. P. 350 (1873) *semble.*

[13] Clark *v.* Heath, 101 Me. 530, 64 Atl. 913 (1906); Barnsdall *v.* Waltemeyer, 142 Fed. 415 (1905).

[14] See 15 Cyc. 259; 7 Encyc. of Pl. and Pr. 368. See also note 2, *supra.*

ment of an action as an election unless there is some element of estoppel *in pais*.[15] The decisions in the former class of cases are more consistent with the rule as generally stated, but the results reached are much less satisfactory from the standpoint of justice. It seems that even those courts which refuse to consider estoppel as a necessary element in election might properly recognize a distinction between the effect of the mere commencement of actions to rescind and actions based on affirmance. The affirmance of a contract voidable by A. for the fraud of B. is a unilateral act. B. has no option. When A., with knowledge of the facts which may entitle him to rescind the contract, ratifies and confirms it by any action which clearly indicates his intention, the binding force of the contract and the status of the property which is the subject of the contract are determined. No judgment of a court is necessary. On the other hand complete rescission except by the actual final decree of a court is practically a bilateral act. Theoretically it may be unilateral, but practically the status of the property is left in doubt unless the other party to the contract acquiesces in the rescission. A. may tender back property to B., but if B. does not accept it, it can never be determined whether A. is entitled to rescission until a court has decided in an equitable action for rescission, or in a suit at law based on rescission by act of the parties, that on all the facts the plaintiff is entitled to rescission. Whether there has been fraud, and if so whether the plaintiff can put the defendant *in statu quo*, whether he has lost the right of rescission by laches, and the like, are among the many questions which always arise when the party claiming fraud seeks to exercise the right of rescission. A suit on the contract or for damages for its breach is in itself a complete affirmation. A suit for rescission, on the other hand, is for all practical purposes a mere attempt to rescind. With-

[15] Gibbs *v.* Jones, 46 Ill. 319 (1868); Mulcahy *v.* Dieudonne, 103 Minn. 352, 115 N. W. 636 (1908); Stier *v.* Harms, 154 Ill. 476, 40 N. E. 296 (1895); Bolton Mines Co. *v.* Stokes, 82 Md. 50, 33 Atl. 491 (1895); Hyde *v.* Kiehl, 183 Pa. St. 414, 38 Atl. 998 (1898); Miller *v.* Hyde, 161 Mass. 472, 37 N. E. 760 (1894). *Cf.* Miller *v.* Hyde, 161 Mass. 472, 482, 37 N. E. 760, 763 (1894); Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775 (1909). See 21 Encyc. of Pl. and Pr. 1030. See also Houston Mercantile Co. *v.* Powell, 72 N. Y. Misc. 358, 130 N. Y. Supp. 274 (1911), holding that commencement of an action in equity for rescission is not a binding election but (*obiter*) that the commencement of an action at law for money had and received based on attempted rescission by act of the party would have been a conclusive election.

out clearly recognizing the ground for the distinction above suggested, the Supreme Court of Indiana recognizes that there is such distinction, and holds that the commencement of an action for damages for fraud is a conclusive election to affirm, while the commencement of an action of rescission is not a conclusive election.[16] On the other hand the Supreme Court of North Carolina in a decision rendered last year[17] held that a mere notice of rescission constitutes a binding election, preventing the plaintiff from recovering damages other than such special damages as are consistent with rescission and recoverable even if rescission is completed.[18] The Supreme Court of Michigan, while apparently opposed to the Indiana doctrine,[19] is also in conflict with the North Carolina court, having held that a mere tender of property and demand for rescission does not constitute a binding election.[20]

The authorities are in conflict also on the question of the right of joint tortfeasors to plead election by the commencement of a prior action against one. In a case already referred to[21] the Court of Appeals of New York held that the mere commencement of an action on the implied contract against one tortfeasor operated to pass the title to the property and constituted a bar to a subsequent action for damages against a joint wrongdoer. This decision is contrary to a decision of the Superior Court of New York in another case,[22] and is contrary to a decision of the Supreme Court of Tennessee.[23] The latter court says:

"If the action be in contract it is not strictly a waiver of the tort, for the tort is the very foundation of the action, but as Nicholson, C. J., has more accurately expressed it, a waiver of the 'damages for conversion' and a suing for the value of the property: Kirkman *v.* Phillips, 7 Heisk. 224. It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrongdoers unimpaired until he has obtained legal satisfaction. If it were otherwise the suing of any

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[16] Cohoon *v.* Fisher, 146 Ind. 583, 45 N. E. 787 (1897).

[17] Stewart *v.* Salisbury Realty & Ins. Co., 74 S. E. 736 (N. C. 1912).

[18] 14 Am. & Eng. Encyc. of Law, 170; Warren *v.* Cole, 15 Mich. 265 (1867).

[19] McLaughlin *v.* Austin, 104 Mich. 491, 62 N. W. 719 (1895).

[20] Glover *v.* Radford, 120 Mich. 542, 79 N. W. 803 (1899).

[21] Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272 (1890).

[22] Cohn *v.* Goldman, 43 N. Y. Super. Ct. 436 (1878). *Cf.* also Hitchin *v.* Campbell, 2 W. Bl. *827 (1772).

[23] Huffman *v.* Hughlett, 11 Lea (Tenn.) 549, 554 (1883).

one of a series of tortfeasors, even the last, on the implied promise where there was clearly no contract would give him good title and release all the others."

A recent decision in Illinois goes even further:

"There is nothing inconsistent between tort and assumpsit where the value of the property is sought to be recovered. Consequently the doctrine of election has no application." [24]

Another important case opposed to the New York decision is Nash *v.* Minnesota Title Insurance & Trust Co.[25] In this case the plaintiff pleaded that he had elected to rescind and had tendered back the property to the vendor. The court held that he had the right to rescind, but that since he had not received satisfaction as a result of the rescission his remedy by an action for damages against the other parties to the fraud remained in force unaffected by the previous rescission.

"In rescinding a contract and in enforcing rights growing out of such rescission one would expect to look only to the other party to the contract. The nature and effect of rescission are such that they can have no consequence except as against the other party to the contract. . . . We do not think the plaintiffs' rescission of the contract on account of the fraud defeats their right to recover these damages from a third party so long as they have failed to obtain satisfaction for their injuries." [26]

The authorities are in conflict also upon the question whether an election can be made by acts, not amounting to an estoppel *in pais*, other than the commencement of suit.[27]

Fifth. The rule is cumbersome in operation, frequently throwing upon the court the burden of trying in one action the question whether the plaintiff would have succeeded in another.

We have already seen that it is established by overwhelming

[24] Edwards, Trustee *v.* Schillinger Brothers Co., 153 Ill. App. 219, 223 (1910).

[25] 163 Mass. 574, 40 N. E. 1039 (1895). See also Kuechle *v.* Springer, 145 Ill. App. 127 (1908); 9 HARV. L. REV. 214.

[26] At p. 582.

[27] Stewart *v.* Salisbury Realty & Ins. Co., 74 S. E. 736 (N. C., 1912); Droege *v.* Ahrens Mfg. Co., 163 N. Y. 466, 57 N. E. 747 (1900); Nash *v.* Minnesota Title Ins. Co., 163 Mass. 574, 582, 40 N. E. 1039, 1041 (1895); Glover *v.* Radford, 120 Mich. 542, 79 N. W. 803 (1899); Brooks *v.* Romano, 149 Ala. 301; 42 So. 819 (1907); Del Vecchio *v.* Savelli, 10 Cal. App. 79, 101 Pac. 32 (1909); Rodermund *v.* Clark, 46 N. Y. 354 (1871). *Cf.* 15 Cyc. 260.

authority that if the plaintiff has not in fact two remedies available the rule as to election of remedies is not applicable.[28] To take the concrete instance above referred to, if the defrauded plaintiff has not the right of rescission there is no election by commencing an unsuccessful action for rescission. If the plaintiff was not entitled to rescission in the first suit the second action for damages may be maintained. No difficulty arises in cases where the first suit has been prosecuted to termination; but when the first action has been dismissed the question whether the plaintiff could have won the prior action must be completely tried in the second, and after all the issues raised in the first suit have been tried in the second, if it is found that the first suit could not have been maintained, the issues raised in the second suit must then be tried. The absurdity of such a result is apparent. In the case of Moller *v.* Tuska [29] the prior suits were still pending, and on plea of election filed in the second suit the court met the difficulty by staying proceedings in the second suit until the determination of the first. In the case of Johnson-Brinkman Commission Co. *v.* Missouri Pacific Ry. Co.[30] the difficulty we have suggested was squarely presented and discussed, as follows:

"The question then arises how was it or by whom was it to be determined that the plaintiff herein mistook his remedy in bringing the attachment suit. It will not be contended, we presume, that after it had been instituted and although plaintiff's attorney had become fully satisfied that the action had been improvidently brought, yet it was necessary in order to save to his client the right to sue in replevin that he should at his expense prosecute the case to final judgment in order to settle that question. Nor do we for one moment suppose that that issue could be tried in this controversy."

If the issue in the first case is not tried in the second we submit that the only proper alternative would be to stay proceedings in the second action until the first could be recommenced and tried to a conclusion. In the case last cited the court evaded the difficulty by holding that there was no election by the first action because there were no circumstances of estoppel.

Sixth. The rule that one must choose at his peril between any

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[28] See note 13, *supra*.

[29] 87 N. Y. 166 (1881).

[30] 124 Mo. 630, 28 S. W. 70 (1894).

available remedial rights which are inconsistent in theory, and that a final election is made by the mere commencement of an action, is of modern origin.

In Coke on Littleton [31] we find these maxims:

"*Electio semel facta, et placitum testatum non patitur regressum.*"
"*Quod semel placuit in electionibus amplius displicere non potest.*"

The author, however, is careful to explain that the scope of the maxims is limited to a choice between real and personal actions, and that they do not apply to actions "meerly personal."

In Comyns' Digest [32] the author says:

"But where an election is of several *remedies* if he chuses one he may afterwards have the other in personal cases as where he has election of several actions. Co. L. 146 A."

Sir William Blackstone concurred in the decision of the case of Hitchin *v.* Campbell.[33] The plaintiffs in that case were assignees of a bankrupt. As such they had previously brought an action of trover against one who had levied on and obtained goods of the bankrupt subsequent to the act of bankruptcy. There was a verdict for the defendant in the first action. They then brought the present action of assumpsit against the same defendant. The court says:

"Another and much stronger objection was that though the assignees may have their election to bring either an action of tort or contract yet they cannot bring both. . . . Cases have been cited to shew that where there are two different kinds of remedies, real and personal, or otherwise specifically distinguished, a man's election of one prevents him from using the other. He may distrein or bring assise; but not both, Litt. S. 588. May bring writ of annuity or distrein, S. 219, and his election is determined even though he should not recover after he hath counted thereon, Co. Litt. 145, but where both remedies are merely real or merely personal then the election is not determined till the judgment on the merits. For a non-suit on an action of account is no bar to an action of debt, Co. Litt. 146. And so must Holt in 12 Mod. 324 be understood to mean that if they bring one they shall not afterwards bring the other; *i. e.*, if the first be brought to a due conclusion."

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[31] Co. Lit. 146 *a*.
[32] Comyn's Digest, tit. Election (c) 2.
[33] 2 W. Bl. 827.

Chitty in his work on Pleading, after an extended discussion of election between different actions, says,[34]

"The circumstances of a party having elected one of several remedies by action will not in general preclude him from abandoning such suit and after having duly discontinued it, he may adopt any other remedy."

An early case sometimes relied on as supporting the modern statements of the rule is Smith *v.* Hodson.[35] This was an action of assumpsit on facts which would have justified an action of trover. The defendants pleaded a set-off, which was objected to by the plaintiffs because of the defendants' tort. It was admitted that the set-off could not have been pleaded if the action had been in form *ex delicto*. The court said that the plaintiffs could not "blow hot and cold," and having elected to proceed in assumpsit they must abide by the consequences. This case is not authority for the rule that the commencement and discontinuance of an action of assumpsit would have been a binding election.

Other early cases, cited in support of the doctrine, involved an election between real and personal actions.[36] Between 1800 and 1850 a number of cases were decided in England which are cited in later cases as supporting the modern rule of election. These cases are not sound authority for the modern rule. Thus in Morris *v.* Robinson[37] it was held that there was no election to waive the tort by an unsuccessful application to a court to obtain the proceeds of the property converted. In Brewer *v.* Sparrow[38] the plaintiffs ratified the sale by actually accepting the proceeds. In Valpy *v.* Sanders[39] it was held that there was no election to ratify a conversion by an unsuccessful demand for the price of the goods. In Lythgoe *v.* Vernon[40] the plaintiff had demanded and received from the defendant all but a small part of the proceeds of a wrongful sale by the defendant of the plaintiff's property. In none of the above cases is there any statement of the rule in its modern form.

In Smith *v.* Baker,[41] however, we find the following language:

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[34] Chitty, Pleading, 234.

[35] 2 Smith's Leading Cases, 146.

[36] Dumpor's Case, 1 Smith's Leading Cases, 8 ed., *47; Jones *v.* Carter, 15 M. & W. 718 (1846); Grimwood *v.* Moss, 41 L. J. C. P. 239 (1872).

[37] 3 B. & C. 196 (1824).

[38] 7 B. & C. 310 (1827).

[39] 5 C. B. 886 (1848).

[40] 5 H. & N. 180 (1860).

[41] L. R. 8 C. P. 350 (1873).

"But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way."

This statement of the rule, however, was not called for by the facts of the case as the plaintiff in that case had not merely commenced a prior proceeding, based on ratification of the defendant's act, but had actually obtained the proceeds of the sale by the defendant of the property converted.

In Clough *v.* London Ry.[42] the question before the court was merely whether the defendant had waited too long before exercising his election to rescind.

The *dicta* as to election of remedies in Scarf *v.* Jardine,[43] which are in line with the modern rule, are made on the assumed authority of the quotation from Coke referred to above. The case presented was not one of election of remedies, but of election between rights to hold different defendants, *i. e.*, the right to hold A. and B. as partners who had actually received the plaintiff's goods, and the right to hold B. and C. as partners by estoppel. A. and B. having been sued and gone into bankruptcy, and the plaintiff having filed his proof of claim against them, he was not allowed to proceed against C.

It will be seen from this outline that the application of the doctrine of election by the English courts has been generally limited to cases where there were elements of estoppel *in pais*, with the single exception of cases dealing with real actions; and that the broadest statements of the rule are *obiter dicta* in comparatively recent cases.[44]

Space forbids a reference to many of the American decisions. The manner of the growth of the doctrine is, however, well illustrated by a comparison of a late New York case with the early decision which it quotes as authority.[45] The later decision held that the mere filing of a verified proof of claim against the assignee of

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[42] L. R. 7 Exch. 26 (1871).

[43] 7 App. Cas. 345, 360–361 (1882).

[44] The English cases are reviewed in an article in 16 Law Quarterly Review, 160, criticising Rice *v.* Reed, [1900] 1 Q. B. 54.

[45] Droege *v.* Ahrens Mfg. Co., 163 N. Y. 466, 57 N. E. 747 (1900); Sanger *v.* Wood, 3 Johns. Ch. (N. Y.) 416, 421 (1818).

an insolvent and fraudulent vendee was an election to affirm the contract so as to bar a suit to rescind. The court says:

"It was observed by Chancellor Kent in Sanger *v.* Wood, 3 Johns. Ch. 421, that any decisive act of a party with knowledge of his rights and of the fact, determines his election in cases of conflicting and inconsistent remedies. This is the principle upon which is based the doctrine of election of remedies."

But Chancellor Kent in the decision relied on had said,

"I consider the going to trial in the action at law and especially the entry of judgment afterwards upon the verdict as a decided confirmation of the settlement."

The result of this review of the operation and history of the doctrine may be summed up in this way: The modern rule of election of remedies is a weed which has recently sprung up in the garden of the common law, its roots stretching along the surface of *obiter dicta* but not reaching the subsoil of principle. The judicial gardeners through whose carelessness it has crept in should be able to eliminate it, or at least to prevent its further growth.

Charles P. Hine.

CLEVELAND, OHIO.